TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 228.

MARTHA COLTON, APPELLANT,

vs

ELLEN M. COLTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED MAY 22, 1888.

E.

REVISED STATUTES OF WISCONSIN.

Sec. 2637. Actions against corporations shall be commenced in the same manner as personal actions against natural persons. The summons and the accompanying complaint or notice aforesaid, shall be served, and such services held of the same effect as personal on a natural person, by delivering a copy thereof, as follows:

Sub-division 9. If against any insurance company, not organized under the laws of this State, to the agent or attorney thereof, having authority therefor by appointment under the provisions of Section 1915 or Section 1953, or to any agent of such corporation, within the definition of Section 1977, in the State.

Sec. 1915. Must have $200,000 of capital paid up. File an instrument in writing, agreeing to accept a license; not to remove cases to U. S. Court. Appoint an Attorney, on whom service of process can be made, and same to be valid service. File copy of Chapter, and make reports, &c.

127-300

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JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 10, 1887.

1 *Bill of Complaint.*

In the Circuit Court of the United States in and for the District of California. In Equity.

MARTHA COLTON, Complainant,

vs.

ELLEN M. COLTON, Defendant.

To the honorable the judges of the circuit court of the United States in and for the district of California:

Martha Colton, of the city of New York, in the State of New York, a citizen of said State, brings this bill against Ellen M. Colton, a citizen of the State of California, residing in San Francisco, in said State of California.

And thereupon your oratrix complains and says that about the year 1829 your oratrix' parents, Isaac W. Colton and Abigail R. Colton, at Sangerville, in the State of Maine, intermarried; that on
2 or about the 17th day of July, 1831, there was born to them, the issue of the said marriage, a son, David D. Colton, and that on or about the 30th day of January, 1844, there was born to them, also the issue of said marriage, a daughter, Martha Colton, your oratrix.

And your oratrix further shows that her said father, Isaac W. Colton, departed this life on or about the 18th day of November, 1875, at the city of New York, where he then resided.

And your oratrix further shows that on or about the first day of March, 1854, the said David D. Colton, the brother of your oratrix, intermarried with the defendant in this cause, and that the said David D. Colton departed this life at the city and county of San Francisco, in the State of California, on the ninth day of October, A. D. 1878.

And your oratrix further shows that on the eighth day of October, A. D. 1878, the said David D. Colton made and executed in due form his last will and testament, a copy of which is hereunto annexed and marked "Exhibit A," and your oratrix prays that the same may form and be taken as a part of this bill.

And your oratrix further shows that, as she is informed and believes, on or about the 29th day of October, A. D. 1878, the defend-
3 ant duly filed the said last will and testament of the said David D. Colton in the then probate court in and for the city and county of San Francisco, State of California, and thereafter such proceedings were duly had in said probate court that on or about the eleventh day of November, A. D. 1878, an order of said probate court was duly made and entered appointing the defendant executrix of the said will and testament, and thereupon the defendant duly qualified as such executrix and letters testamentary upon the said last will and testament were duly granted and issued to her, the said defendant, and the said defendant thereupon entered upon and thereafter continued to discharge the duties as such ex-

ecutrix until about the eighteenth day of December, A. D. 1879, when, by an order or decree of said probate court, then and there duly made and entered, the whole estate, real and personal, of the said David D. Colton then remaining was distributed to the said defendant and she was discharged from any further duties as such executrix.

And your oratrix further shows that the said estate of the said David D. Colton, so as aforesaid distributed to the defendant, was and is of great value, as your oratrix is informed and believes, of about one million dollars, and, as your oratrix is informed and believes, is growing and increasing in value.

4 And your oratrix further shows that the said defendant has, although often demanded, utterly failed, neglected, and refused to make to or for your oratrix any gift or provision whatever from the estate of your oratrix' brother, the said David D. Colton.

And your oratrix further shows that on or about the 20th day of October, 1883, your oratrix made, signed, and caused to be served on the defendant, at the said city and county of San Francisco, State of California, a demand that she execute the terms and directions of the last will and testament of the said David D. Colton, and that from his estate, so as aforesaid distributed to the defendant, she make a suitable provision for your oratrix, a copy of which said demand is annexed to this bill as "Exhibit B," and which said exhibit your oratrix prays may be taken to form a part of this bill.

But so it is, may it please your honors, that the defendant, notwithstanding the said demand, has failed, neglected, and refused, and still fails, neglects, and refuses, to make a suitable or any provision whatever for your oratrix.

Your oratrix further shows that she has no estate, property, or income; that for many years she has been and still is de-

5 pendent upon her mother, the said Abigail R. Colton, for her support and maintainance; that ever since your oratrix was a young child her said mother has been in feeble health, and has always required your oratrix' aid and services, and especially during the lengthened illness and last sickness of your oratrix' said father, and ever since the death of your oratrix' said father as aforesaid her said mother has been an invalid, and has endured much sickness and suffering, and has required much medical attendance, and the almost constant nursing and care of your oratrix.

And your oratrix further shows that about December, 1869, your oratrix' said father, Isaac W. Colton, then residing in the city of New York, at the request of your oratrix' brother, the said David D. Colton, then residing in San Francisco aforesaid, converted all of his property, consisting of what was then known as five-twenty bonds of the Government of the United States, as was well known to the said David D., in gold, amounting to the sum of fifteen thousand dollars, and loaned the same to the said David D.; and thereupon your oratrix' father received therefor the promissory note of the said David D. Colton, dated at San Francisco aforesaid, on or about December 7th, 1869, for the said sum of $15,000, pay-

6 able in gold, with interest; that afterwards, on or about March 1st, 1873, the said David D. Colton renewed his said note by giving his new note to his father, the said Isaac W. Colton, for the same amount and payable in the same manner, and which said new note was owned and held by your oratrix' said father at the time of his death.

And your oratrix further shows that her said father died intestate, and that after his death and on or about March first, A. D. 1877, the said David D. Colton, with the consent of your oratrix, took up said last-mentioned note by giving his new note therefor, payable to his or your oratrix' mother, the said Abigail R. Colton, for the said sum of fifteen thousand dollars, with interest, and thereby your oratrix surrendered and relinquished all her legal share and interest in the said note so held by her father at the time of his death, as aforesaid, as your oratrix' brother, the said David D. Colton, well knew.

To the end, therefore, that the said defendant may be compelled to execute the terms and directions of the said last will and testament of the said David D. Colton, and to make your oratrix a suitable provision from the said estate of the said David D. Colton in such amount and in such manner as to your honors shall

7 seem most meet and proper in the premises:

May it please your honors to grant unto your oratrix your writ of subpœna, directed to the said Ellen M. Colton, commanding her to appear and answer this bill of complaint, and to do and re-receive what by your honors shall seem meet.

MARTHA COLTON.
W. W. FOOTE,
Solicitor for Complainant.

W. W. FOOTE,
Of Counsel for Complainant.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Martha Colton, the complainant in the above-entitled bill, being duly sworn, doth depose and say that she has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated on her information and belief, and as to those matters she believes it to be true.

MARTHA COLTON.

Sworn to before me this 20th day of November, 1883.
[NOTARIAL SEAL.]
H. P. ALLEN,
Notary Public, N. Y. C'y.

8 "EXHIBIT A."

I, David D. Colton, of San Francisco, make this my last will and testament. I declare that all of the estate of which I shall die posses-ed is community property and was acquired since my mar-

riage with my wife. I give and bequeath to my said wife, Ellen M. Colton, all of the — estate of which I shall die *siezed*, possessed, or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best. I also request my dear wife to make such provision for my daughter Helen, wife of Crittenden Thornton, and Carrie as she may in her love for them choose to exercise. I hereby appoint my said wife to be the executrix of this my last will and testament, and desire that no bonds be required of her for the performance of any of her duties as such executrix.

I authorize and empower her to sell, dispose, and convey of any and of all of the estate of which I shall die *siezed* or possessed, without obtaining the order of the probate court or of any court, and upon such terms and in such manner, with or without notice, as to her shall seem best. If my said wife shall desire the assistance of any one in the settlement of my estate, I hereby appoint my
9 friend S. M. Wilson, of San Francisco, and my secretary, Charles E. Green, of San Francisco, to be joined with her in the said executorship, and authorize her to call in either or both of the said gentlemen to be her co-executors; and in case she shall so unite either or both of them with her the same provisions are hereby made applicable to them as I have before made for her in reference to bonds and duties and powers.

San Francisco, October 8th, 1878.

DAVID D. COLTON.

Witness:

L. C. LANE,
652 *Mission St., San Francisco.*
RALPH C. HARRISON,
919 *Pine St., San Francisco.*

The above and foregoing instrument of two pages was, on the 8th day of October, A. D. 1878, signed by the therein-named David D. Colton in our presence, and was by him at the time of signing the same declared to be his last will and testament, and thereupon, and after he had so signed and declared the same, we, in his presence and in the presence of each other and at his request, signed our name- thereto as witnesses.

San Francisco, October 8th, 1878.

L. C. LANE,
652 *Mission St., San Fracisco.*
RALPH C. HARRISON,
919 *Pine St., San Francisco.*

10 "EXHIBIT B."

NEW YORK, *September* 29, 1883.

To Mrs. Ellen M. Colton, San Francisco, Cal.:

By the last will and testament of my brother, the late David D. Colton, and which said last will and testament bears date the 8th day of October, 1878, the legal title of all the estate, both real and

personal, of which my said brother died *siezed* or possessed, or entitled to, was vested in you for the uses and purposes in the said last will and testament expressed, and you were appointed executrix of said last will and testament.

In the said last will and testament are contained these words: "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best."

My brother, the said David D. Colton, died at the city and county of San Francisco, in the State of California, on the 9th day of October, 1878.

On or about the 29th day of October, 1878, you duly filed the said last will and testament in the then probate court in and for the city and county of San Francisco, State of California,
11 and thereafter such proceedings were duly had in said probate court that on or about the 11th day of November, 1878, an order of said court was duly made and entered appointing you executrix of said last will and testament, and thereupon you duly qualified as such executrix, and letters testamentary upon the said last will and testament were duly granted and issued to you, and thereupon you entered upon and thereafter you continued the discharge of your duties as such executrix until about the 18th day of December, 1879, when, by an order or decree of said probate court, then and there duly made and entered, the whole estate, real and personal, of the said David D. Colton, deceased, then remaining was distributed to you and you were discharged from any further duties as such executrix.

It is now over three years since the said estate came in your possession, yet you have utterly failed and neglected to make a suitable or any provision for me, the sister of the said deceased.

I now therefore demand that you do forthwith execute the terms and directions of my said brother's last will and testament, and that from his said estate you do make a suitable provision for me, his sister.

MARTHA COLTON.

12 [Endorsed:] Filed Dec'r 11, 1883. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

13 *Demurrer.*

In the Circuit Court of the United States in and for the Ninth Circuit and District of California.

MARTHA COLTON, Complainant,

vs.

ELLEN M. COLTON, Defendant.

The defendant, Ellen M. Colton, by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are

therein set forth and alleged, does demur to the said bill, and for cause of demurrer shows:

First. That the said complainant hath not by her said bill made such a case as entitles the said complainant to any relief in this court touching any of the matters therein complained of, in this, that no estate, trust, or interest exists in favor of said complainant or arises in her favor out of the said last will and testament in her bill set forth or any matter, legacy, or devise therein contained.

Second. That this court hath no jurisdiction of the matters
14 and things set forth in said complainant's bill, nor hath it jurisdiction to consider the same or to grant the relief p-ayed for or any relief whatever.

Third. That neither this court nor any other court whatever hath jurisdiction to hear and determine the matters and things set forth in complainant's said bill or to grant the relief therein prayed or any other relief whatever.

Fourth. That it appears on the face of said complainant's bill that if any cause of action whatever exists by reason of the matters and things in said bill set forth that such cause of action is founded upon a stale equity and claim.

Fifth. That it appears on the face of complainant's said bill that the said cause of action therein set forth, if any such exists, accrued more than four years before the commencement of this action, and that the same is barred upon the principle which courts of equity follow in analogy to the statute of limitations at law.

Sixth. That it appears upon the face of said complainant's bill that the said pretended cause of action therein set forth accrued
15 more than four years before the filing of her said bill.

Seventh. That it appears on the face of complainant's said bill that the matters and things therein sought to be enquired of and determined have long since been enquired into and determined against the said complainant by the probate court of the city and county of San Francisco, State of California.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demur thereto, and prays the judgment of this honorable court whether she shall be compelled to make any further and other answer to the said bill; and she humbly prays to be dismissed from hence with her reasonable costs in this behalf sustained.

CRITTENDEN THORNTON,
Solicitor for Defendant, Ellen M. Colton.

STANLEY, STONEY & HAYES, *Of Counsel.*

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

THOMAS P. STONEY,
Counsel for Defendant, Ellen M. Colton.

16 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Ellen M. Colton, the above-named defendant, being duly sworn, on her oath doth say that the foregoing demurrer is not interposed for delay.

—— ——.

Subscribed and sworn to before me this — day of June, 1884.

—— ——.

The affidavit of the defendant is hereby waived.
June 4, 1884.

W. W. FOOTE,
For Compl't.

(Endorsed:) Service of a copy of the within demurrer is hereby admitted this 4th day of June, 1884. W. W. Foote, for compl't. Filed June 19, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

17 At a stated term, to wit, the July term, A. D. 1884, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 22nd day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Order Sustaining Demurrer.

MARTHA COLTON
vs.
ELLEN M. COLTON. } No. 3178.

This cause heretofore heard and submitted to the court for consideration and decision upon the demurrer herein having been duly considered, it is ordered that said demurrer be, and the same hereby is, sustained and the bill of complaint herein is dismissed.

It is further ordered that a decree be filed and entered herein accordingly.

18 *Clerk's Certificate.*

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 22 day of September, A. D. 1884.

[Seal Circuit Court.]

L. S. B. SAWYER, *Clerk,*
By F. D. MONCTON,
Deputy Clerk.

19 *Enrollment.*

United States Circuit Court, Ninth Circuit, District of California.

MARTHA COLTON, Complainant,
vs.
ELLEN M. COLTON, Respondent. } No. 3178.

The complainant filed her bill of complaint herein on the 11th day of December, 1883, which is hereto annexed.

On the 19th day of June, 1884, a demurrer was filed herein, which is hereto annexed.

On the 22d day of September, 1884, an order on said demurrer was made and entered herein, a certified copy of which order is hereto annexed.

On the same day, to wit, September 22d, 1884, a final decree was filed and entered herein in the words and figures following, to wit:

20 At a stated term, to wit, the July term, A. D. 1884, of the circuit court of — America, of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 22d day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Decree.

MARTHA COLTON
vs.
ELLEN M. COLTON. } No. 3178.

The court having sustained the demurrer of the respondent to the complainant's bill of complaint herein and ordered that said bill be dismissed at complainant's cost—

Thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the complainant's bill herein be, and the same hereby is, dismissed.

And it is further ordered that said complainant pay said
21 respondent her costs in this behalf expended, to be taxed.

SAWYER,
Circuit Judge.

(Endorsed:) Filed and entered September 22, 1884. L. S. B. Sawyer, clerk.

22 *Clerk's Certificate.*

Whereupon said pleadings, certified copy of order, and final decreee are hereto annexed, said decree being duly signed, filed, and enrolled, pursuant to the practice of said circuit court.

[Seal Circuit Court.]

Attest, &c.

L. S. B. SAWYER, *Clerk,*
By F. D. MONCTON,
Deputy Clerk.

(Endorsed:) Enrolled papers. Filed September 22, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

23 *Opinion.*

Circuit Court, District of California.

ABIGAIL R. COLTON *v.* ELLEN M. COLTON.

Will construed—Trusts—Recommendation and request.—The will of David D. Colton contains this provision: "I give and bequeath to my said wife, Ellen M. Colton, all my estate, real and personal, of which I shall die seized or possessed or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." Held, That this provision is not an absolute gift or bequest in trust for the mother and sister of the testator; that it is not an imperative command to make the provision for their support, but only a recommendation and request, leaving the matter to the judgment and discretion of his surviving wife.

Trusts arising from precatory words in wills.—The conditions necessary to raise a trust from words of recommendation and request in a will discussed.

Rules for construction of wills under the civil code of California stated and applied.

The opinion states the facts.

W. W. & H. S. Foote and Grove L. Johnson, for the complainant; Crittenden Thornton and Stanley, Stoney & Hayes, for the defendant.

SEPTEMBER 22, 1884.

SAWYER, *Circuit Judge:*

This is a bill in equity to establish a trust in favor of complainant in the estate of the late David D. Colton, deceased, in the hands of his devisee and legatee, Ellen M. Colton, and to obtain a decree against the defendant, requiring her to make a suitable provision out of the estate devised and bequeathed to defendant for the maintenance of complainant.

The will out of which the suit arises is as follows, to wit: "I, David D. Colton, of San Francisco, make this my last will and testament. I declare that all of the estate of which I shall die possessed is community property and was acquired since my marriage with my wife. I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized or possessed or entitled to. I recommend to her the care and protection of my mother and sister and request her to make such gift and provision for them as in her judgment will be best. I also request my dear wife to make such provision for my daughter Helen, wife of Crittenden Thornton, and Carrie as she may in her love for them choose to exercise. I hereby appoint my said wife to be the

executrix of this my last will and testament, and desire that no bonds be required of her for the performance of any of her duties as such executrix. I authorize and empower her to sell, dispose of, and convey any and all of the estate of which I shall die seized and possessed, without obtaining the order of the probate court, or of any court, and upon such terms and in such manner, with or without notice, as to her shall seem best. If my said wife shall desire the assistance of any one in the settlement of my estate I hereby appoint my friend, S. M. Wilson, of San Francisco, and my secretary, Charles E. Green, to be joined with her in the said executorship, and authorize her to call in either or both of the said gentlemen to be her co-executors; and in case she shall so unite either or both of them with her the same provisions are hereby made applicable to them as I have before made for her in reference to bonds and duties and powers."

The question is, Does this will create a trust in favor of complainant? Do the recommendations and requests found in the will give an absolute legacy to the complainant out of the estate, and do they constitute an imperative command to make the provision, or is the matter left to the discretion of the surviving wife, as sole devisee and legatee, to act in the matter as her judgment and feelings shall dictate? It cannot be denied that the earlier English decisions, and a few of the earlier cases in this country, go a long way toward sustaining the claim set up by the complainant. But later cases, both in England and the United States, considerably limit the construction given by the earlier decisions to precatory words of a will, or words of request or recommendation, and some of them, especially in this country, fall little short of repudiating and altogether overruling the earlier cases. Says Story, on this subject: "In the interpretation of the language of wills also courts of equity have gone great lengths by creating implied or constructive trusts from mere recommendatory and precatory words of the testator." 2 Story's Eq. Jur., sec. 1068.

After considering the English cases, he adds: "The doctrine of thus construing expressions of recommendation, confidence, hope, wish, and desire into positive and peremptory commands is not a little difficult to be maintained upon sound principles of interpretation of the actual intention of the testator. It can scarcely be presumed that every testator should not clearly understand the difference between such expressions and words of positive direction and command; and that, in using the one and omitting the other, he should not have a determinate end in view. It will be agreed on all sides that where the intention of the testator is to leave the whole subject, as a pure matter of discretion, to the good will and pleasure of the party enjoying his confidence and favor, and where his expressions of desire are intended as mere moral suggestions to excite and aid that discretion, but not absolutely to control or govern it, there the language cannot and ought not to be held to create a trust. Now, words of recommendation and other words precatory in their nature imply that very discretion, as contradistinguished from peremptory orders, and, therefore, ought to be so

construed, unless a different sense is irresistibly forced upon them by the context. Accordingly, in more modern times a strong disposition has been indicated not to extend his doctrine of recommendatory trusts, but, as far as the authorities will allow, to give to the words of wills their natural and ordinary sense, unless it is clear that they are designed to be used in a peremptory sense." 2 Story Eq., sec. 1070.

The most favorable rule for complainant now recognized
24 that can be deduced from the body of the English authorities is, doubtless, that stated by Lord Langdale in Knight *v.* Knight, 3 Beav., 173, where he said: "As a general rule, it has been laid down that where property has been given absolutely to any person, and the same person *is*, by the giver, who has power to command, been recommended or entreated or wished to dispose of that property in favor of another, the recommendation, entreaty, or wish should be held to create a trust—1, if the words are so used that, upon the whole, they ought to be construed as imperative; 2, if the subject of the recommendation or wish be certain, and, 3, if the objects or persons intended to have the benefit of the recommendation or wish be also certain." See 44 Am. Dec., 372; note to Harrison *v.* Harrison's Adm'r, 2 Grat., 1. On the contrary, in the language of Story: "Wherever, therefore, the objects of the supposed recommendatory trusts are not certain or definite; wherever the property to which it is to attach is not certain or definite; wherever a clear discretion or choice to act or not to act is given; wherever the prior dispositions of the property import absolute and uncontrollable ownership; in all such cases courts of equity will not create a trust from words of this character." 2 Story's Eq. Jur., sec. 1070; see also Howard *v.* Carusi, 109 U. S., 733-'4, citing and recognizing the rule as stated by Story, and 2 Pomeroy's Eq. Jur., sec. 1014 to 1017, where the subject is well discussed.

Upon a careful consideration of the language of the will, giving the words their usual natural signification as they would, doubtless, be understood almost, if not quite, universally by ordinarily intelligent English speaking people, without reference to any strained, artificial, or technical rules of construction, it appears to me that two, at least, if not three of these requisite conditions negatively stated are found in the will. The "objects of the supposed recommendatory trusts" are, undoubtedly, "certain and definite;" they are the mother and sister of the testator. But "the property to which it (the trust) is to attach is not certain or definite." "The subject of the recommendation or wish" is surely not "certain." No specific property or amount is indicated as the subject of the asserted legacy or trust. The testator only "requests" his general legatee and devisee "to make such gift and provision for them as in her judgment will be best," apparently leaving the whole matter to her judgment and discretion. How is the court to determine to what property or to what amount of money the trust is to attach? Neither the property nor the amount of money is indicated, and the testator has not left the matter to the judgment of the court to determine, but in express terms to the judgment of his surviving

wife—his sole devisee and legatee. The subject is, therefore, not certain or definite. The testator has neither indicated the particular property nor the particular amount of money out of the million of dollars in value claimed to have been left to which the legacy of trust is to attach, nor has he indicated any rule by which the property or amount can be ascertained other than the judgment of his surviving wife, which judgment she appears to have exercised, for she made gifts from time to time in small sums, amounting in the aggregate to fifteen hundred dollars. Certainly the property or amount of money to which the trust, if any there be, is to attach—the subject of the recommendation or request or the subject of the trust—could not well be more uncertain or more indefinite. In the absence of words expressly creating a trust this indefiniteness and uncertainty constitute strong evidence that the testator did not intend to create a trust. In language quoted from 10 Ves., 536: "And wherever the subject to be administered as trust property and the objects for whose benefit it is to be administered are not to be found in the will not expressly creating a trust, the indefinite nature and *quantum* of the subject and the indefinite nature of the objects are always used by the court as evidence that the mind of the testator was not to create a trust, and the difficulty that would be imposed upon the court to say what should be so applied or to what objects has been the foundation of the argument that no trust was intended, or, as Lord Eldon expresses it in another case, Turn. & Russ., 159, 'where a trust is to be raised, characterized by uncertainty, the very difficulty of doing it is an argument which goes, to a certain extent, towards inducing the court to say it is not sufficiently clear what the testator intended.' See, also, Knight *v.* Boughton, 11 Clark & Finnel R., 548;" note to sec. 1070, Sto. Eq. Jur., p. 284–'5. In the notes to Harrison *v.* Harrison's Adm'x, 2 Grat., 1, reported in 44 Am. Dec., 375, and in 2 Sto. Eq. Jur., sec. 1073, *et seq.*, notes, the cases are cited illustrating certainty and uncertainty in a will, within the meaning of the condition of the rule adopted by the courts as to the subject of the recommendation or request, and, as it appears to me, few of those provisions held to be too uncertain to create a trust are more uncertain or indefinite than the provision in the will in question. And in the language of Lord Cottenham in Finden *v.* Stephens, 2 Phil., 142, "Words of recommendation are never construed as trusts unless the subject be certain." 44 Am. Dec., 376. The will in question, therefore, fails in this condition of certainty as to the subject essential to the creation of a trust by precatory words, even under the English rule, most favorable to such trusts now recognized.

Again, under that branch of the rule stated by Story, that wherever "the prior dispositions of the property import absolute uncontrollable ownership, courts of equity will not create a trust from words of this character," 2 Sto. Eq. Jr., sec. 1070, this will is deficient in this one of the elements from which the intention to create a trust can be inferred. No language can more clearly and unmistakably "dispose of property" absolutely or "import absolute uncontrollable ownership" in the devisee or legatee than the

language of this will making "the prior disposition of the property of the testator," which is, "I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized or possessed or entitled to." And further on in his will, the testator adds: "I authorize and empower her to sell, dispose of, and convey any and all of the estate of which I shall die seized and possessed, without obtaining the order of the probate court or of any court, and upon such terms and in such manner, without or without notice, as to her shall seem best." If this language of gift and devise and this power to dispose of and control does not constitute "a prior disposition of the property," which "imports absolute and uncontrollable ownership," then I am at a loss to know what would express that idea or effect such a purpose. In this respect, also, the will is deficient in one of the elements suggested by Story as necessary to create a trust from mere precatory words or words of recommendation, or expressing a desire.

Again, are the words considered by themselves "so used as upon the whole they ought to be construed as imperative," or is there "a clear discretion or choice to act or not to act" given, irrespective of other elements to be considered. The language, and all the language, to be considered on this point is, "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best;" or, in effect, I do not myself make any gift or any provision for them according to my judgment or determine how much they ought to have, but I recommend them "to her care and protection," and I "request her to make such gift and provision for them as in her judgment will be best."

By the express terms of the civil code of California "a will is to be construed according to the intention of the testator, and the "testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it is made, exclusive of his oral declarations." "All parts of the will are to be construed in relation to each other, and so as if possible to form a consistent whole." A clear and distinct devise or bequest cannot be affected * * * by any other words not equally clear and distinct, or by inference or argument * * * from other parts of the will." "The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected and that other can be ascertained." Civil Code, sections 1317–'18, 1321–'2, 1324. It seems to me that under these rules it is impossible to hold it to have been the intention of the testator himself to give absolutely any portion of his estate to be held in trust for complainant. The language is plain and readily understood, taking the words in their ordinary and grammatical sense. The testator manifestly appreciated the difference, which every one must recognize, between words of absolute devise or bequest and mere words of recommendation or request. To construe these latter words of recommendation and request as meaning precisely the same thing as words of absolute request would be to give them a meaning entirely different from the sense in which they are ordinarily used and ordinarily

understood. The "clear and distinct" prior absolute "devise and bequest" to the defendant of all his estate, in language which it is impossible to misunderstand, would be materially "affected" by converting an indefinite and unascertainable part of the absolute estate given to defendant into a trust, by "words not equally clear and distinct," "by inference or argument from other parts of the will," contrary to the rule expressly laid down by the code. Had the testator intended to give any part of his estate absolutely in trust for the complainant he would certainly have so stated, and would have declared what part or how much money he intended to set apart for her. He would have made the extent of his bequest "clear and distinct"—as clear and distinct as the devise to the defendant—and not left it to the sole judgment of the defendant to determine the amount or character or value of the bequest or the extent of his bounty.

The language of the will cited seems to be plain and intelligible. It is not the language of gift or devise or the language of command. It is clearly language of recommendation and request, leaving the matter to the discretion and judgment of his surviving wife to carry out his suggestion or not, or to such extent as seems to her best, according to the dictates of her own discretion and judgment. Such is the plain import of the words as they would ordinarily be understood when taken by themselves and considered by the great mass of English-speaking people without reference to strained, artificial, or technical rules of construction. They are, as it seems to me, so plain to the common mind as not to need interpretation. But when we come to call in other elements recognized by the rules of construction heretofore adopted by the courts for the purpose of aiding in converting the recommendation and request into a command or gift we still find that all these elements except one—the certainty as to the objects—are wanting. The testator manifestly understood the force of language. He knew well what language to use to express his intention to make a divise or bequest. There is no uncertain sound in "I give and bequeath to my wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized or possessed." If he had intended to make a gift, bequest, or devise to his mother and sister he certainly knew in what language to express that intent, and he would have said so, and how much. He has expressed, in specific language, no intention to give to them directly or to any one in trust for them any portion of his estate, or if any portion what particular portion or how much. He has simply used words of recommendation and request to his sole devisee and legatee, and left the whole matter, in express terms, to her judgment. This is the plain natural meaning of his language when taken by itself or when considered in connection with all the other language of the will. When we consider the concise, clear, and specific language of this brief will, in all of its other parts, it seems impossible that the testator should have used words of mere recommendation and request to his wife, committing the whole matter as to the gift and
26 provisions for them, in express terms, to her judgment; that he should have requested her to make the gift when he in-

tended to make a gift, legacy, or devise to them himself, when he intended to command.

It is urged on the part of the claimant that in this class of cases a wish expressed or a simple request to the devoted and obedient wife is equivalent to a command. This, when voluntarily recognized as an obligation by the wife in the affairs of married life, may be a very proper and salutary principle and practice in marital polity and domestic etiquette, but it is too romantic; too largely deficient in the sanctions of the obligations of positive law; too loose and uncertain to be adopted by the courts as a rule of law by which large estates are to be distributed in opposition to the plain, ordinary, actual matter-of-fact sense of the words of a will. As to myself I fully concur with Vice-Chancellor Hart, in his observations in Sale *v.* Moore, 1 Sim., 540, "That the first case that construed words of recommendation into a command made a will for the testator, for every one knows the distinction between them." He further adds that "the current authorities of late years *has* been against converting the legatee into a trustee." See 44 Am. Dec., 378, note. In my judgment, to hold that the precatory words and words of recommendation found in the will of the late General Colton creates an indefinite trust in an unascertained and uncertain *quantum* of the estate of the deceased in the hands of Mrs. Colton for the benefit of the mother and sister of the testator would be to make a will for the deceased, and not to execute the will made by him.

An argument is sought to be derived in favor of a construction creating a trust from the last two clauses in the will relating to co-executors. In case the executrix should desire assistance in the execution of the will the testator provisionally appoints two other gentlemen as exeutors, and authorizes the executrix to associate either one or both as co-executor or co-executors, "and in case she shall so unite either or both with her the same provisions are hereby made applicable to them, as I have before made for her, in reference to bonds and duties and powers." It is argued that under this provision the recommendation and request as to care and provision for the testator's mother and sister would impose the same trust on them as is imposed upon Mrs. Colton, and that certainly as to them the request is equivalent to a command, and being so as to them they must have the same construction with respect to Mrs. Colton; but the character of Mrs. Colton, as executrix and as devisee and legatee, are wholly different and distinct. These words of recommendation and request were addressed to her as the wife of the testator and his devisee and legatee, and not as the executrix of his will, as owner and not administratrix of his estate. She has performed all her trusts as executrix; the estate has been settled and distributed to her as devisee and legatee, and she has been discharged from her trust as executrix. So it appears from the bill.

This suit is brought against her to enforce a trust vested in her as legatee for the benefit of the complainant and not against her in her representative character as executrix. So the closing passage of the will, making the same provision applicable to her co-executor or co-executors, in the contingency provided for, "as I have before made

for her in reference to bonds and duties and powers," has sole reference to the bonds waived and to the "duties and powers" conferred on her as executrix. It confers no rights or powers or duties upon these co-executors in the character of devisees or legatees, and no argument can be derived from this passage to support the creation by the court of a trust.

Upon the views thus taken upon the construction of the will it is unnecessary to notice the other points argued under the demurrer. The demurrer is sustained, and, as the whole case depends upon the construction of the will, no amendment can be made to the bill that will obviate the objection taken by the demurrer. The bill must therefore be dismissed, and it is so ordered.

MARTHA COLTON *v.* ELLEN M. COLTON.

SEPTEMBER 22, 1884.

Bill dismissed on authority of Colton *v.* Colton, *ante.*

W. W. & H. S. Foote and Grove L. Johnson, for the complainant; Crittenden, Thornton and Stanley, Stoney & Hayes, for the defendant.

SAWYER, *Circuit Judge:*

This is a bill in equity, seeking a decree declaring and enforcing a trust in favor of the sister of the late David D. Colton, deceased, claimed to arise out of the same clause of the will, considered in the preceding case of Abigail R. Colton *v.* Ellen M. Colton. The same construction must, of course, be given to the clause of this case as was adopted in the other. For reasons in that case stated the demurrer to the bill must be sustained and the bill dismissed, and it is so ordered.

Endorsed: Read in open court September 22, 1884. L. S. B. Sawyer, clerk.

27 At a stated term, to wit, the July term, A. D. 1884, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and county of San Francisco, on Wednesday, the 29th day of October, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Lorenzo Sawyer, circuit judge; the Honorable George M. Sabin, U. S. district judge, of Nevada.

Order Allowing an Appeal.

MARTHA COLTON
vs.
ELLEN M. COLTON. } No. 3178.

On motion of W. W. Foote, Esq., of counsel for the complainant herein, it is ordered that an appeal from the decree filed and

28 entered herein on the 22d day of September, A. D. 1884, being a day in the July term, A. D. 1884, of said circuit court, to the Supreme Court of the United States be, and the same hereby is, allowed, and that a certified transcript of the pleadings, depositions, evidence, stipulations, and proceedings be forthwith transmitted to the Supreme Court of the United States upon the appellant giving a bond in the sum of five hundred dollars.

29 *Bond on Appeal.*

In the Supreme Court of the United States.

MARTHA COLTON, Appellant, *vs.* ELLEN M. COLTON, Appellee.

Know all men by these presents that we, F. A. Hassey and Holland Smith, are held and firmly bound unto Ellen M. Colton, the above-named appellee, in the sum of five hundred dollars, gold coin of the United States of America, to be paid to said Ellen M. Colton, her heirs, executors, or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

In witness whereof we have hereunto set our hands and
30 affixed our seals this 22d day of November, 1884.

The condition of this obligation is such that whereas the above-named Martha Colton has taken an appeal to the Supreme Court of the United States to reverse the decree rendered by the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, in the cause entitled Martha Colton against Ellen M. Colton (No. 3178), which said decree was filed and entered of record on the twenty-second day of September, A. D. 1884:

Now, therefore, if the above-named Martha Colton shall prosecute her said appeal to effect and answer all costs if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain in full force and virtue.

F. A. HASSEY. [SEAL.]
HOLLAND SMITH. [SEAL.]

Signed, sealed, and delivered in presence of—

L. S. B. SAWYER.

31 UNITED STATES OF AMERICA, } ss:
District of California, }

F. A. Hassey and Holland Smith, being duly sworn, each for himself says that he is a householder within the district aforesaid, and that he is worth the sum of five thousand dollars in gold coin of the United States of America, exclusive of property exempt from execution and over and above all his just debts and liabilities.

F. A. HASSEY.
HOLLAND SMITH.

Subscribed and sworn to before me this 22d day of November, 1884.

L. S. B. SAWYER,
Com'r U. S. Cir't Court Dist. Cal.

Endorsed: The form of the within bond and the sufficiency of the sureties thereon are hereby approved. (Signed) Lorenzo Sawyer, U. S. circuit judge 9th judicial circuit. Filed Nov'r 22, 1884. L. S. B. Sawyer, clerk.

32 In the Circuit Court of the United States for the District of California.

MARTHA COLTON
vs.
ELLEN M. COLTON } No. 3178.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the foregoing thirty-one written and printed pages, numbered from 1 to 31, inclusive, to be a full, true, and correct copy of the record and of all proceedings in the above and therein entitled cause, and that the same together constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and seal of said circuit court this 2d day of April, A. D. 1885.

[Seal of the Circuit Court, District of Cala.]

L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON,
Deputy Clerk.

33 UNITED STATES OF AMERICA, *ss:*

To Ellen M. Colton, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1885, pursuant to an order allowing an appeal from the final decree of the circuit court of the United States of America in and for the district of California, wherein Martha Colton is appellant and you are appellee, to show cause, if any there be, why the said decree in the said cause mentioned should be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States for the district of California, this 22d day of November, A. D. 1884, and of the Independence of the United States the one hundred and ninth.

[Seal of the Circuit Court, District of Cala.]

LORENZO SAWYER,
Circuit Judge.

34 [Endorsed:] No. 3178. In the Supreme Court of the United States. Martha Colton, appellant, *vs.* Ellen M. Colton, appellee. Citation. Filed April 1, 1875. L. S. B. Sawyer, clerk U. S. circuit court, district of California, by F. D. Moncton, deputy clerk.

Service of a copy of the within citation is hereby acknowledged this 31st day of March, 1884.

STANLEY, STONEY & HAYES,
Att'ys for Appellee.
CRITTENDEN THORNTON,
Solicitor for Appellee.

Endorsed on cover: California C. C. U. S. No. 228. Martha Colton, appellant, *vs.* Ellen M. Colton. Filed May 22d, 1885.